O'Daniel Trucking Co. *and* Southern Illinois Larorers' District Council, affiliated with Laborers' International Union of North America, AFL–CIO. Case 14–CA–22138

November 22, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On May 26, 1993, Administrative Law Judge Donald R. Holley issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Respondent Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In finding that the Respondent did not violate Sec. 8(a)(1) by telling Local 1197 Business Manager Taylor, through Supervisor Mann, that it would not hire laborers ''until we get this mess straightened up over this contract,'' we rely solely on the judge's crediting the testimony of Mann, who testified that he made no such statement. Thus, we do not rely on the judge's statement that the remark, even if made, would not have ''interfere[d] with, restrain[ed], or coerce[d]'' any listening employees because they were already members of another union.

In finding that the Respondent did not violate Sec. 8(a)(3) because, inter alia, the Charging Party was unwilling to refer union members to the Respondent in the absence of a signed agreement, we rely solely on the undisputed fact that the Union's representatives told the Respondent as much during the parties' July 23, 1992 negotiating session. Thus, we do not rely on the judge's statements that the Charging Party's conduct in filing the representation petition and picketing jobs at which the Respondent supplied equipment and operators is necessarily inconsistent with the Charging Party's willingness to make referrals. Nor do we rely on the fact that employee Clydus Gray declined the Respondent's offer of employment as indicative of the Union's unwillingness to refer laborers to the Respondent.

Kathleen C. Fothergill, Esq., for the General Counsel.
Joseph A. Yocum, Esq. (Yocum & Yocum), of Evansville, Indiana, for the Respondent.
John R. Taylor, Field Representative, of McLeansboro, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On an original charge filed in the captioned case on October 7, 1992,[1] amended on November 3, the Regional Director for Region 14 of the National Labor Relations Board issued a complaint on November 5 which alleged that since on or about July 28, 1992, O'Daniel Trucking Co. (the Respondent) has engaged in conduct which violates Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Respondent filed a timely answer denying it had engaged in the unfair labor practices described in the complaint.

The case was heard in Carmi, Illinois, on February 25 and 26, 1992. All parties appeared and were afforded full opportunity to participate.[2] On the entire record, including careful consideration of posthearing briefs filed by the parties, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Carmi, Illinois, a yard operation in East Carmi, and a sand and gravel dredge operation in Maunie, Illinois, is engaged in the truck transportation of mine refuse and construction materials and the commercial and residential construction and repair of concrete and asphalt roads, parking lots, and driveways. During the 12-month period ending October 31, 1992, in the conduct of its business operations, Respondent provided services valued in excess of $50,000 to enterprises which meet an appropriate standard for the assertion of Board jurisdiction other than solely an indirect basis. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that Southern Illinois Laborers' District Council, affiliated with Laborers' International Union of North America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Allegations*

Summarized, the complaint, in final amended form, alleges: that Respondent violated Section 8(a)(1) of the Act on or about July 28, 1992, by stating in the presence of employees that it would not employ members of the Laborers Union because of the Union's efforts to be certified as the representative of certain of Respondent's employees; that Respondent violated Section 8(a)(3) of the Act since April 7, 1992, by refusing to hire and/or recall employees Dave Bark-

[1] All dates here are 1992 are unless otherwise indicated.

[2] At the opening of the hearing, General Counsel amended the complaint by (1) striking the date of July 28, 1992, in pars. 6(a) and 8(a) and substituting therefor the date of April 7, 1992; and (2) adding the name of Jaye Evans and Randy Gunther to par. 6(a) and changing the first name of employee Williams from Guy to Gaylord.

er, Laura Boldwyn, Bob Burkett, Clydus Gray, Jamie Gray, James Schook, Gaylord Williams, Jaye Evans, and Randy Gunther; and that it violated Section 8(a)(5) of the Act since April 7, 1992, by transferring unit work to nonunit employees without notice to and/or bargaining with the Union.

B. *Facts*

1. Business of Respondent

The record in this case, which includes the Regional Director's Decision and Direction of Election in Case 14–RC–11134, placed in the record as General Counsel's Exhibit 4, reveals that Respondent maintains its principal office and a yard operation in Carmi, Illinois, an additional asphalt-cement facility in East Carmi, and a sand and gravel operation in Maunie, Illinois. Respondent commenced its ready-mix and asphalt operations in 1973, and currently has six cement trucks which make deliveries to customers and to Respondent's construction projects. Since about 1975, Respondent has transported mine refuse from a mine location to a dumping site, where it deposits slag and covers it with dirt. That portion of its business accounts for approximately 50 percent of its gross revenue. Prior to 1992, Respondent derived a substantial part of its gross income from the construction of highways and from the paving of streets, parking lots, and driveways.

At times material here, Respondent's permanent employee complement has numbered 50–60 employees. The job classifications of those employed include truckdrivers, mechanics, operators, welders, laborers/yard workers, sand pit operator, sand pit loader, and office clericals. It is admitted that Respondent's employees are supervised by: E. H. O'Daniel Jr., president; J. W. Edwards, corporate secretary; and John Mann, asphalt-batch plant supervisor and part-owner. Additionally, the record reveals that part-owner and Respondent vice president, John O'Daniel, together with Edwards, supervises construction work.[3]

Since 1972 or 1973, Respondent's hourly paid employees have been represented by a labor organization called the Congress of Independent Unions (CIU). In the above-mentioned representation case, the Regional Director concluded that the then subsisting collective-bargaining agreement between Respondent and CIU was an 8(f) contract. The current agreement contains certain provisions which must be considered to resolve issues raised in the instant case. One such provision, found at article II, paragraph 1 of the agreement, states, in pertinent part:

> if it becomes necessary from time to time for the Employer to need extra help on a temporary basis, the Union agrees that these temporary employees could be obtained from other labor unions within the particular crafts for the type of employees needed.

2. General Counsel's case

During the period extending from 1979 to December 1991, Respondent regularly obtained laborers who belonged to one of several local unions affiliated with Charging Party (District Council) during the construction season. The construction season was described as that time of year when the ground is not frozen, normally April to November. Although the record fails to reveal the arrangement which existed between Respondent and the local Laborers Unions during the period described, it does reveal that employees were referred to Respondent in the absence of collective-bargaining agreements between the parties most of the time.

To establish that the alleged discriminatees whose names are set forth in the complaint were regularly employed by Respondent during the 1990 and 1991 construction season, General Counsel placed in evidence as General Counsel's Exhibits 11 and 12 documents which revealed the hours worked during stated months by members of Laborers Local 1197, together with the remittances made to various union trust funds. It is uncontested that, during the 2-year period under discussion, Respondent employed Local 1197 members Clydus Gray and Joseph Tate as keymen, and that it employed Bob Burkett, a member of Laborers Local 1260, as a keyman.[4] The record reveals that Tate was employed on a permanent basis and maintained membership in CIU as well as Laborers Local 1197. Gray and Burkett were contacted directly by Respondent at the beginning of both the 1990 and 1991 construction seasons and they cleared in with their respective local unions after being asked to report for work by Respondent. General Counsel's Exhibits 11 and 12, considered together with the testimony of individual discriminatees, reveal that each of them, with exception of Boldwyn, worked a sufficient number of days for Respondent in 1990 and/or 1991 to be eligible to vote in the election held in Case 14–RC–11134 on April 8, 1992.[5]

General Counsel sought, through testimony given by alleged discriminatees and by business managers and/or business agents to establish that all laborers work on Respondent's construction jobs was performed in 1990 and 1991 by members of local unions affiliated with Charging Party. The technique employed by General Counsel with employee witnesses was to ask them if the work they performed for Respondent was the type described in article V of Charging Party's agreement with Wabash Valley Contractors Association and the Associated General Contractors of Illinois (the Association),[6] and whether any employees other than those represented by local unions affiliated with Charging Party performed any of the work.[7] The witnesses uniformly testi-

[3] I find each of the named individuals to be supervisors within the meaning of Sec. 2(11) of the Act and agents of Respondent within the meaning of Sec. 2(13) of the Act.

[4] A keyman, as described in art. II(1) (G.C. Exh. 2) is allowed to move from one local to another throughout the construction season.

[5] The approximate number of hours and days worked by alleged discriminatees (excepting Laura Boldwyn) in 1990 and 1991 are: 1990—C. Gray 517 hours—64 days; G. Williams 900 hours—112 days; B. Burkett 111 hours—14 days; J. Gray 604 hours—75 days; J. Evans 54 hours—6 days; J. Tate 876 hours—109 days; and J. Schook 143 hours—18 days. 1991—C. Gray 353 hours—44 days; B. Burkett 754 hours—94 days; J. Tate 771 hours—96 days; G. Williams 688 hours—86 days; J. Evans 560 hours—72 days; J. Schook—546 hours—68 days; D. Barker 581 hours—72 days; and R. Gunther 248 hours—31 days.

Boldwyn's testimony reveals she worked at Respondent from August until November in 1990 (21 days), and from June 18 to August 5 in 1991.

[6] G.C. Exh. 2.

[7] Art. V, sec. B of the contract lists 30 classes of work claimed as laborer work.

fied the work they performed for Respondent was described in article V of General Counsel's Exhibit 2, and that laborers other than those that belonged to a Laborers Union Local only worked with them in emergency situations. Local 1197 Business Manager John Taylor and Local 1260 Business Representative Curtis Masterson corroborated the testimony of the employees. Significantly, Taylor admitted during his testimony that Charging Party had two types of collective-bargaining agreements with the Wabash Valley Contractors Association, i.e., a successor agreement to General Counsel's Exhibit 2 ''Covering Highway/Heavy Utility Construction,'' and a ''Residential'' agreement.

For some reason not adequately explained by the record, Charging Party caused Respondent to execute the Association Agreement in late December 1991. Shortly thereafter, in January 1992, Respondent notified Charging Party it was terminating their agreement effective March 31, 1992. Charging Party then filed the petition in Case 14–CA–11134 on January 31, 1992. The Regional Director's Decision and Direction of Election was issued on March 10, 1992, and the Employer's request for review was denied by order dated April 8, 1992. The Charging Party won an election conducted on April 8, 1992, by a vote of 6 to 1; and on May 6, 1992, an objection to the election filed by Respondent was overruled and Charging Party was certified as the exclusive collective-bargaining representative of employees in the following unit:

> All construction laborers employed by the Employer at its heavy and highway construction jobsites, EXCLUDING all drivers, operators, office clerical and professional employees, guards, and supervisors as defined in the Act, and all other employees.

By letter dated June 2, 1992, Charging Party requested that Respondent contact it to set a date for the commencement of negotiations. The parties met on July 23, 1992. Respondent was represented by E. H. (Hill) O'Daniel Jr., Bill Edwards, and John O'Daniel. The Charging Party was represented by Edward Smith and John Taylor.

Taylor testified that Hill O'Daniel stated on July 23 that he was not going to use their people; that it was all immaterial because they were going out of the construction part of the business and would not need an agreement anyway. Taylor acknowledged that the only proposals made by Charging Party at the meeting were those contained in the agreement which had been reached with the Association.

The record reveals that Respondent did not contact Clydus Gray or Bob Burkett to offer them employment as keymen during 1992. Similarly, it reveals that it did not request, and the local Laborer Unions did not refer any employees to Respondent in 1992. Joseph Tate, who admittedly told Respondent officials prior to the April 8, 1992 election that he was going to vote in Respondent's favor, remains a permanent employee at Respondent. Clydus Gray testified that John O'Daniel told him shortly before the election that he could work for them in 1992 if the operation went CIU. Gray did not accept the offer.

In an attempt to establish that Respondent performed work that would fall under the job classifications set forth in article V of the Association Agreement during 1992, General Counsel placed a number of documents in evidence. Thus General Counsel's Exhibits 14(a) through (k) contain some five invoices which reflect that Respondent performed patching of sidewalks, construction of a handicapped ramp at a school, and similar functions for Carmi White County Comm. Unit 5, all with a total value of $3757. Similarly, General Counsel's Exhibits 15(a) through (d) contain two invoices together with supporting documents which reveal that on September 22, 1992, Respondent sold and delivered to White County Highway Department hot mix (asphalt) valued at $18,720. General Counsel's Exhibits 16(a) through (d) are photocopies of checks which reveal that during the period extending from August 13 to November 6, 1992, Respondent provided blacktopping for the city of Carmi, together with certain concrete patching, in an aggregate amount of $181,685.93. General Counsel placed in evidence as General Counsel's Exhibit 17 a compilation of invoices bearing various 1992 dates which reflect concrete/asphalt sales to various customers. Respondent stipulated the documents reflect work on which it was required to pay prevailing rates.[8] Placed in the record as General Counsel's Exhibit 18 was a compilation of documents which reveal asphalt, rock, and concrete sales to a number of named individuals during calendar year 1992. Respondent claims such sales and/or services were residential in character.

During his testimony, Local 1197 Business Manager Taylor indicated that little construction work was performed within the jurisdiction of his local union during 1992. With specific regard to Respondent, he testified he did not observe them perform any construction work until July 28 when he observed a Respondent crew which was engaged in blacktopping on the west side of the Carmi High School. Taylor described the incident as one wherein John Mann, Respondent's blacktop superintendent, and Respondent employees Scott Lamont and Darrell Yeager were at the site with a paving machine and a roller, and they were apparently waiting for a truck with hot blacktop. He recalled that when he approached, Mann and Lamont were sitting on the stoop of a nearby house where they could be in the shade. Taylor asserts he walked up to Mann and asked how come he did not call the hall and request laborers for that project. He recalled Mann said, ''I don't need any laborers.'' Taylor asserts he then stated: ''John, the last three of four years you have used laborers out here when you are blacktopping streets;[9] what's the problem now?'' Taylor claims Mann's response was ''until we get this mess straightened up over this contract, we are not going to use none of your people.'' Taylor claimed that, when the described conversation began, employee Yeager walked up within 5 or 10 feet of him and Mann. He voiced the opinion that Yeager, and perhaps Lamont, heard the conversation.

Taylor indicated that on July 28, and on prior occasions, he had observed Scott Lamont operate a paver, and he observed Yeager operate a roller.[10] He credibly testified that

[8] The compilation contains duplicates of invoices placed in the record as G.C. Exhs. 14, 15, and 16.

[9] Taylor indicated he had observed employees Lamont and Yeager work at blacktop spread for a number of years.

[10] Asked by General Counsel if, on July 28, he saw anyone performing work that is traditionally considered laborers' work as described in the contract, Taylor answered ''yes.'' He then claimed the ''laborer'' work was that being performed by Mann, Lamont,

Respondent did not give him notice prior to July 28 that it was going to accomplish the blacktopping at the high school with employees other than employees represented by Laborers Unions. Similarly, he testified O'Daniel did not afford him an opportunity to bargain over that work.

Asked if he personally observed Respondent perform any other construction work in 1992, Taylor stated that in late October he saw them pouring concrete in front of the high school, but he did not stop. He testified, however, that Local 1197 picketed Respondent at a bridge job on Route 45 near Hinsdale, Illinois, in October, and the Local picketed another construction site Respondent had people on in November.

Taylor claimed he would have referred laborers to Respondent during the 1992 construction season if Respondent had requested them.

When he appeared as a witness, Local 1260 Business Representative Curtis Masterson was also asked what he knew about Respondent quitting the construction end of its business in 1992. He replied, ''I know they didn't do much work,'' and that they ''didn't do any hardly'' in his jurisdiction. Asked if he observed them on any construction jobs in his area, he said he saw Mann and a crew, which included Yeager and Lamont, getting ready to blacktop the ambulance parking lot in Fairfield in September. Masterson indicated he asked Mann if he was going to use any of their laborers on the job and he claims Mann said no, that there had been some kind of lawsuit with the District Council and trouble with the agreement. Masterson recalled they briefly discussed prevailing wage requirements, and he recalled Mann said that people on the job would be paid the prevailing rate. He indicated that in response to his inquiry, Mann told him he had some alleys to do in Fairfield 3 or 4 days later; that he intended to pay prevailing rate on the job.

3. Respondent's defense

Respondent presented its defense through testimony given by John Mann, James William Edwards, and John O'Daniel.

Mann, as indicated, supra, is a part owner of Respondent, and he is superintendent of the asphalt operation. He indicated his job functions include selling the jobs, coordinating the trucks and the people that work under him, and the performance of various functions out on jobs such as operating a machine, shovel, or anything else which is required.

According to Mann, when he goes to a project, he normally takes two people plus truckdrivers with him. He claims that those employees, coupled with several people at the asphalt plant, enable him to perform his jobs. Mann testified that his asphalt employees are members of and have been represented by CIU since 1972 or 1973. He testified that the volume of asphalt work remained much as it had been in prior years in 1992, and that he accomplished it by using employees represented by CIU as he had always accomplished it in earlier years.

When asked if he told John Taylor on July 28, 1992, that O'Daniel was not going to use people from the Laborers because the Laborers Union was trying to be certified as their representative, he said no and claimed he did not say anything like that to Taylor. Mann acknowledged that he conversed with Local 1260 Business Representative Masterson in September 1992. He denied that he told Masterson during their conversation that he was not going to use any of his people any more. Instead, he recalled the conversation was one wherein Masterson told him John Taylor wanted him to get Respondent to sign a contract with them for an upcoming job at, which he incorrectly thought they had successfully bid. Mann testified he told Masterson he could not sign a contract with them under the circumstances. He added that he did not have the authority to sign a contract for O'Daniel.

Edwards and John O'Daniel both indicated during their testimony that they serve as superintendents on ''highway and construction'' work. O'Daniel described the work as involving concrete work, dirt work, storm sewers, and complete street jobs. Both he and Edwards claimed that there had been no such work which they were able to perform in the area during 1992, and for that reason they had neither bid nor been awarded such work in 1992.

O'Daniel testified that most of Respondent's permanent employees were normally busy with residential work before the road construction season began. He testified that CIU-represented employees are used primarily on residential work, but that they are occasionally used on heavy construction work. He defined construction work as that work on which Respondent is required to pay a prevailing wage, and indicated that laborer employees obtained from Laborers Unions normally work road construction, but are asked, on occasion, to perform residential work. He indicated that keymen Gray and Burgess, in particular, were asked to perform residential work on occasion. Finally, he testified Respondent has not requested that the Laborers Union refer employees to assist it in performing its residential work.

Edwards and John O'Daniel both testified that Respondent's representatives were told at the July 23 negotiation session that no laborers would be referred to them unless they signed the previously negotiated Association Agreement. Edwards recalled that when Hill O'Daniel indicated he would not sign the agreement at the July 23 meeting, he asked why couldn't they continue the way they always had. He recalled that Smith replied there would not be any laborers without a signed agreement.

Edwards and John O'Daniel both described difficulties Respondent experienced on two heavy construction jobs during the fall of 1992. They indicated the general contractor on one job, a bridge in Enfield, was E. T. Simmons, and that Simmons had asked them to supply it with a dump truck and a back hoe. Edwards testified that when Taylor's Local 1197 picketed the job, Simmons' foreman removed Respondent's equipment and operators from the site. The general contractor on the second job, which was on Route 1, was Wabash Asphalt. It had requested a back hoe and an operator. When Local 1197 picketed the job, Respondent's operator and equipment were removed from the job. Local 1197 Business Manager Taylor acknowledged during his testimony that the picket signs used during the above-described incidents advertised that O'Daniel did not have a contract with the Laborers Union.

Edwards admitted during his testimony that he spoke with both Burkett and Clydus Gray before the NLRB election. He testified he told Burkett if they lost the election, they would not be bidding any road contracts, and he indicated that he told Gray that if the election did not go Respondent's way, it could possibly be a hardship on it.

Yeager, and the truckdrivers bringing asphalt from the plant to the street (see Tr. 40).

Conclusions

1. Credibility

The major credibility issues posed in the instant case are whether representatives of Charging Party refused to consider the referral of laborers to Respondent in the absence of a signed contract, and whether Union Representatives Taylor and Matheson were told by Respondent Superintendent Mann, in two separate conversations, that Respondent did not intend to utilize laborers represented by Charging Party until the mess over the contract was straightened up. For the reasons set forth below, I resolve credibility issues involving Mann and Taylor in Respondent's favor, but resolve the issue involving Mann and Matheson in Charging Party's favor.

The referral issue was first discussed at the July 23 negotiation session. Significantly, Respondent Representative Edwards testified, without contradiction, that after H. O'Daniel informed Union Representatives Taylor and Smith that he would not sign the Association contract, he asked them why they could not continue the way they always had, i.e., obtain laborers in the absence of a signed contract. Edwards claims Smith responded by stating there would not be any laborers without a signed contract. Taylor was not called as a rebuttal witness to deny that the above-described verbal exchange occurred. Instead, near the end of his direct examination General Counsel asked him if he would have referred laborers to Respondent during 1992 if Respondent had requested them. He answered yes. Edwards, whose claim that Respondent was told on July 23 that there would be no laborers absent a signed contract was corroborated by J. O'Daniel, was an impressive witness and I credit his testimony regarding the July 23 meeting. I do not credit Taylor's assertion that he would have referred laborers to Respondent in 1992 even though they refused to sign the association agreement. Indeed, Charging Party's filing of the R Case petition to avoid a lawful termination of Charging Party's representative status among Respondent's temporary laborer employees and Local 1197's picketing action at jobs on which Respondent had equipment and employees during the fall 1992 constitute actions which are inconsistent with Taylor's claim that he was willing to refer employees to Respondent in the absence of a contractual relationship.[11]

As noted, supra, Union Representatives Taylor and Matheson both contend that they approached Mann while he was engaged in blacktopping and asked if he intended to use employees represented by their local union on such jobs. Mann was asked if he told Taylor and Matheson he did not intend to use people from their locals until the contract dispute and/or a lawsuit was settled. Mann categorically denied making any such comment to Taylor. Because I normally view categorical denials unaccompanied by a recitation of the witnesses' best recollection of any conversation which did occur skeptically, I am persuaded I should credit Mann over Taylor. In addition to the fact that I have rejected Taylor's claim that he would have referred laborers to Respondent even though they had no signed contract with the Laborers Union, I note that Taylor indicated, when describing his contact with Mann, that all the people working on that particular blacktopping job, including Mann, the truckdrivers, the paver operator (Lamont), and the roller operator (Yeager), were performing work customarily performed by persons represented by Laborers Unions. At a later point in the proceeding, Taylor admitted that he had seen Lamont operate a paver and Yeager a roller during prior years. Patently, Lamont and Yeager, while operating machines, were engaged in work which would more aptly be described as that normally performed by Operating Engineers rather than by Laborers. In short, Taylor had a tendency to exaggerate, and I conclude he tailored his testimony to meet the needs of General Counsel's case.

With respect to the Mann-Matheson situation, both individuals appeared, when describing the incident, to state their best recollections of what occurred. Matheson exhibited better recall of the incident than Mann. In the circumstances described, I credit Matheson's claim that Mann told him he was not going to use any of his (Matheson's) laborers on the project because of a lawsuit and/or trouble with the agreement.

2. The alleged 8(a)(1) conduct

Paragraph 5 of the complaint alleges that Supervisor Mann stated in the presence of employees on or about July 28, 1992, that Respondent would not employ members of the Union because of the Union's efforts to be certified as the representative of certain employees of Respondent.

As indicated, supra, Local 1197 Business Manager Taylor testified that, when he asked Mann on July 28, 1992, why he was not using laborers on blacktopping work, Mann stated: ''until we get this mess straighted up over this contract, we are not going to use none of your people.'' Mann categorically denied making the statement or saying anything like it. For the reasons set forth above, I conclude it is most unlikely that Taylor, some 5 days after Respondent had been told it would receive no laborers without a signed contract, would ask Mann why he was not using laborers represented by his union on the blacktopping job. Significantly, employees Lamont and Yeager were not called as witnesses by General Counsel to corroborate Taylor's testimony. I credit Mann's denial. Moreover, I note that the record reveals that employees Lamont and Yeager are members of and are represented by CIU. Assuming, arguendo, Mann made the comment attributed to him by Taylor, and, assuming arguendo, that the named employees heard the comment, a persuasive argument could be made that such a comment would not ''interfere with, restrain, or coerce'' employees Lamont and Yeager in their exercise of or enjoyment of rights guaranteed by Section 7 of the Act. I recommend that paragraph 5 of the complaint be dismissed.

3. The alleged 8(a)(3) violations

The complaint alleges that Respondent refused, in violation of Section 8(a)(3) of the Act, to hire and/or recall employees Dave Barker, Laura Boldwyn, Bob Burkett, Clydus Gray, Jamie Gray, James Schook, Gaylord Williams, Jaye Evans, and Randy Gunther after April 7, 1992, because they

[11] I also find significant that record evidence which reveals that John O'Daniel offered Clydus Gray 1992 employment shortly before the April 7 election. Gray declined the offer indicating he may seek work outside the construction industries during the 1992 season. I sincerely doubt he would have declined the offer if he could have obtained clearance through Local 1197.

supported the Union or engaged in other protected activity. For the reasons set forth below, I find that General Counsel offered insufficient credible evidence to prove the allegation.

The evidentiary burden of the parties is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), where the Board stated (at 1089):

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Patently, by establishing that each of the alleged discriminatees belongs to one of the locals of the District Council; that each was either referred to or cleared by his local for employment at Respondent; and that Respondent submitted appropriate trust fund remittances for all hours worked by the discriminatees, General Counsel has shown that the alleged discriminatees were all members of the Laborers Union and Respondent had knowledge of that fact. Additionally, the alleged discriminatees who appeared to give testimony in the instant case all indicated that they voted in the April 8, 1992 election at Respondent's facility, and as Respondent admittedly knew that employee Tate cast the only no vote, it is clear the remaining employees whose votes were counted voted for union representation.

Having concluded that General Counsel has satisfied the first two elements of the alleged 8(a)(3) violation, I turn now to consideration of whether the evidence adduced warrants an inference that the employees' participation in protected conduct was a ''motivating factor'' in Respondent's decision to refrain from employing them in 1992.

General Counsel's claim that Respondent refused to request that locals belonging to the District Counsel refer laborers to it in 1992 because the alleged discriminatees voted for union representation in the April 8, 1992 election is bottomed on a claim that Respondent performed work during the 1992 construction season which would normally have been performed by Laborers Local members and a claim that the local unions comprising the District Council were ready and willing to refer laborers to Respondent. I conclude that General Counsel has failed to offer sufficient evidence to prove the described contentions.

With respect to the work actually performed by Respondent during the 1992 construction season, General Counsel, as revealed, supra, placed in evidence as General Counsel's Exhibits 14–18 a number of invoices which documented charges for sales and/or work performed by Respondent for various customers during the 1992 construction season. The vast majority of the invoices billed customers for blacktopping which had been performed by Respondent and the remainder documented limited concrete work performed for customers. Significantly, counsel for General Counsel elected to simply let the invoices speak for themselves and she refrained from causing a witness to interpret the invoices and to indicate whether Respondent's permanent employees or the laborers it obtained from Laborers Locals normally performed the work described in each invoice. When Respondent's asphalt plant superintendent, Mann appeared as a witness, he testified that the blacktopping which Respondent did in 1992 was accomplished by his normal blacktopping crew which consisted of two men at the plant, himself, employee Lamont on the paving machine, Yeager on the roller, and a number of truckdrivers. Union Representative Taylor verified Mann's claim to a certain extent as he acknowledged that Lamont and Yeager were operating the paving machine and the roller on July 28, 1992, and he indicated he had seen them perform the same functions during prior years.

In addition to the claims advanced by Mann which are inferentially supported by Taylor, Respondent owners, Edwards and John O'Daniel, testified that Respondent did not bid or obtain any road construction work during the 1992 construction season. Union Representatives Taylor and Matheson both indicated that little road construction was performed within the areas served by their locals during 1992, and Taylor testified Respondent performed none in his area until July 28, 1992. As observed, supra, he described the work Respondent was performing at the Carmi High School as work which belonged to Laborers even though it would appear to be work normally performed by members of other trades. Similarly, although he claimed Respondent was performing laborer work on the two road construction jobs Local 1197 picketed, the record reveals that Respondent was merely providing equipment and operators on both jobs.

Finally, in addition to the above observations, it should be noted that at all times material here Respondent's 50–60 permanent employees were represented by the CIU. Significantly, their contract restricted Respondent's use of temporary employees, such as members of the Laborers Union to situations where the employment of such employees was necessary.

In sum, when the above-discussed factors are considered, I reach the conclusion that General Counsel failed to establish that Respondent performed a significant amount of work on which it would have normally used members of Laborers Locals during the 1992 construction season.

As indicated, supra, credited testimony given by Respondent official Edwards reveals that when H. O'Daniel asked during the July 23, 1992 negotiation session why they could not continue as they always had, Smith replied there would be no laborers without a signed agreement. As I view the record, Smith's remark was predictable. Thus, the record reveals that Respondent informed the District Council shortly after it signed the Association Agreement in December 1991 that it intended to terminate its 8(f) relationship when the contract expired on March 31, 1992. As noted, supra, the District Council sought to keep the relationship alive by filing a petition for an election which would enable it to obtain 9(a) status. One must infer that the District Council sought an election because it intended to place Respondent in a position wherein it would be compelled to sign a new agreement with it. Indeed, the purpose of the action was not to gain representative rights, the individuals who were to vote were and had long been members of constituent local unions. Although General Counsel argues in brief that there was no indication that the local Laborers Unions would refuse to refer members to Respondent until the July 28 negotiating session, the fact that Clydus Gray refused a job offer made by John O'Daniel shortly after the petition for an election was filed suggests that Gray was possibly aware that Local

1197 Business Manager Taylor would not approve his acceptance of the offer.

In sum, I find that General Counsel has failed to establish that Respondent needed the services of employees represented by the Laborers Union during the 1992 construction season. Moreover, I find that General Counsel has failed to establish by credible evidence that the local unions which comprise the Charging Party would have referred members to employment at Respondent during 1992 in the absence of a signed contract. Accordingly, I find that General Counsel has failed to make a showing that the union activities or sentiments of the alleged discriminatees was a ''motivating factor'' in Respondent's decision to not employ them in 1992. I recommend that the 8(a)(3) allegations of the complaint be dismissed.

4. The alleged 8(a)(5) violation

a. *The appropriate unit*

The complaint alleges that since May 6, 1992, the District Council has been the exclusive collective-bargaining agent of employees in the following unit, which is an appropriate unit for bargaining within the meaning of Section 9(b) of the Act:

> All construction laborers employed by the Employer at its heavy and highway construction jobsites, EXCLUDING all drivers, operators, office clerical and professional employees, guards, and supervisors as defined in the Act, and all other employees.

Although Respondent denied the unit allegations set forth in paragraph 7 of the complaint, the described unit was found to constitute a unit appropriate for the purposes of bargaining within the meaning of Section 9(b) of the Act in the Regional Director's Decision and Direction of Election issued on March 10, 1992, in Case 14–RC–11134.[12] Subsequently, the District Counsel was certified as the exclusive collective-bargaining agent of employees in the unit described above on May 6, 1992.[13] Accordingly, I find that the District Council has been the exclusive collective-bargaining agent of employees in the described unit since May 6, 1992.

b. *The alleged unlawful activity*

The complaint alleges that Respondent has violated Section 8(a)(5) of the Act since April 7, 1992, by assigning work previously performed by employees in the unit represented by the District Council to other employees of Respondent without giving the District Council prior notice and affording it an opportunity to bargain with respect to such conduct and the effects of such conduct.

As noted above, the CIU has represented Respondent's hourly paid employees at all relevant times, and its collective-bargaining agreement provides, inter alia:

> if it becomes necessary from time to time for the Employer to need extra help on a temporary basis, the Union agrees that these temporary employees could be obtained from other labor unions within the particular crafts for the type of employees needed.

I have found, supra, that General Counsel has failed to establish that the Respondent needed the services of employees represented by District Council during the 1992 construction season. Moreover, I have found that General Counsel has failed to establish, by credible evidence, that the local unions comprising the District Council would have referred laborers to Respondent in the absence of a signed contract. As indicated, supra, General Counsel failed to prove that Respondent performed any road construction work normally accomplished by employees furnished by the Laborers Locals in 1992, while the Respondent has shown that it accomplished blacktopping during 1992, with the same CIU represented crew which has performed such work in prior years.

In the circumstances described, I find that General Counsel has failed to prove that Respondent transferred work normally performed by Laborers Union employees to other employees. Accordingly, I recommend that the 8(a)(5) allegations in the complaint be dismissed.

CONCLUSIONS OF LAW

1. O'Daniel Trucking Co. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The District Council is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed in its entirety.

[12] See G.C. Exh. 4.

[13] See G.C. Exh. 8.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.